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Lines Insurance Company

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

**STARR SURPLUS LINES INSURANCE  
COMPANY, an Illinois corporation,**

Plaintiff,

v.

**TIMBERLAND, INC., a Washington  
corporation; SEABOLD CONSTRUCTION  
CO., INC., an Oregon corporation; LAUREL  
PARC AT BETHANY LLC and LAUREL  
PARC AL AT BETHANY LLC, Oregon  
limited liability companies;**

Defendants.

**Civil Action No.**

**COMPLAINT**

Declaratory Relief

28 U.S.C. § 2201

DEMAND FOR JURY TRIAL

Plaintiff alleges:

**PARTIES**

1.

Plaintiff Starr Surplus Lines Insurance Company (“Starr”) is an Illinois corporation with its principal place of business in New York. At the material times, Starr conducted business in

the State of Oregon as a foreign insurance company issuing surplus lines of coverage through an authorized Oregon surplus lines licensee. Starr issued a commercial general liability insurance policy, bearing policy number SLPG-GL00145-00, to defendant Timberland, Inc., effective August 20, 2010 through August 20, 2011.

2.

Defendant Timberland, Inc. (“Timberland”) is a Washington corporation registered to do business under the name “Timberland, Inc. a corporation of Washington.” Timberland does regular and sustained business in the State of Oregon as a licensed construction contractor, Oregon CCB no. 149672.

3.

Defendant Seabold Construction Co., Inc. (“Seabold”) is an Oregon corporation doing business in the State of Oregon as a licensed construction contractor, Oregon CCB no. 48023.

4.

Defendants Laurel Parc at Bethany, LLC, and Laurel Parc AL at Bethany, LLC, (collectively “Laurel Parc”) are Oregon limited liability companies.

## **FACTS**

5.

In or about August 2007, Seabold entered into a contract with Laurel Parc to serve as general contractor for a construction project located in Washington County, Oregon, known as Laurel Parc at Bethany (the “Project”). In or about October 2007, Timberland entered a subcontract with Seabold to perform certain wood framing work at the Project. Work at the Project commenced in August 2007 and was substantially completed in or about May 2009.

6.

In and around April through July 2010, investigation by construction experts engaged by Laurel Parc identified construction defects and resultant property damage at the Project. On September 24, 2010, Laurel Parc issued notice to Seabold, pursuant to ORS 701.565, that construction defects and property damage had been identified during the inspections in April through July 2010. Laurel Parc indicated that the identified construction defects and resultant property damage was caused or contributed to by the work performed by Seabold and its subcontractors, including Timberland.

7.

Defendants Timberland, Seabold, and Laurel Parc presently are parties to a lawsuit filed in Washington County Circuit Court and now pending before the Arbitration Service of Portland, which was filed by Laurel Parc on October 20, 2010, originally captioned *Laurel Parc at Bethany LLC, and Laurel Parc AL at Bethany LLC v. Seabold Construction Co., Inc., and Western Surety Company*, bearing case no. C107026CV (the “Underlying Action”).

8.

In the Underlying Action, Seabold filed a third party complaint naming Timberland and other subcontractors as third-party defendants. The Underlying Action is now pending before the Arbitration Service of Portland as case no. 101020, and is entitled *Laurel Parc at Bethany LLC, and Laurel Parc AL at Bethany LLC, plaintiffs, v. Seabold Construction Co., Inc., Western Surety Company, T.M. Rippey Consulting Engineers, Inc., Contract Flooring Consultants, LLC, Custom Masonry, Inc., D. Wolfe, Inc., K & O Contracting, LLC, MSI Mechanical Systems, Inc., Associated Masonry Restoration, Inc., dba Pardue Restoration,*

*Stalcup Roofing & Construction, LLC, and Timberland, Inc., defendants; Seabold Construction Co., Inc. and Western Surety Company, third-party plaintiffs, v. Contract Flooring Consultants, LLC, Custom Masonry, Inc., D. Wolfe, Inc., Associated Masonry Restoration, Inc., dba Pardue Restoration, Stalcup Roofing & Construction, LLC, Timberland, Inc., MSI Mechanical Systems, Inc., Bear Electric, Inc., Acoustilevel Floor System, Inc., JND Fire Sprinkler, Inc., and Drywall Assemblies Systems, Inc., third-party defendants.*

9.

In the Underlying Action, Laurel Parc and Seabold each seek money damages in excess of \$5,000,000 for the construction defects and resultant property damage. Seabold also seeks indemnification from Timberland for any award of damages against it, along with its costs and fees incurred in defending the Underlying Action.

10.

Defendant Timberland has tendered the claims asserted by Laurel Parc and Seabold in the Underlying Action to Starr and requested to be defended and indemnified.

11.

By letters dated October 20, 2010, May 10, 2011, December 22, 2011, and June 4, 2012, Starr denied coverage for the Underlying Action and declined to participate in Timberland's defense. Starr issued a reservation of rights, denying that any indemnity coverage or defense obligation existed for the damages sought in the Underlying Action or for settlement payments made by or on behalf of Timberland, because under the terms, conditions, limitations, and exclusions on coverage contained in the insurance policy, no coverage exists.

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12.

In January 2013, the parties in the Underlying Action engaged in mediation in an attempt to resolve the dispute. Subject to a complete reservation of rights, Starr agreed to join in the defense being provided to Timberland, effective January 2, 2013.

13.

An actual and justiciable controversy exists between Starr and Timberland regarding whether the Starr policies provide any indemnity coverage or further defense obligation for the claims asserted against Timberland by Laurel Parc and Seabold in the Underlying Action.

### **JURISDICTION AND VENUE**

14.

Jurisdiction is proper in this court under 28 U.S.C. § 1332 based on diversity of citizenship. The amount in controversy, exclusive of interest or costs, exceeds the sum specified in 28 U.S.C. § 1332. This court has jurisdiction over Starr's request for declaratory relief under 28 U.S.C. § 2201. Venue is proper under 28 U.S.C. § 1391(a) and LR 3-2, because this action has been brought in the judicial district where a substantial part of the events or omissions giving rise to the claims occurred.

### **CLAIM FOR DECLARATORY RELIEF**

15.

Starr re-alleges and incorporates paragraphs 1 through 14 as if fully set forth herein.

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16.

The policy issued by Starr to Timberland provided certain liability insurance coverage, subject to specified terms, conditions, limitations, endorsements and exclusions contained in the policy, including the following provisions:

**COMMERCIAL GENERAL LIABILITY COVERAGE FORM**

**SECTION I – COVERAGES**

**COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

**1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. \* \* \*
- b. This insurance applies to “bodily injury” and “property damage” only if:
  - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”; [and]
  - (2) The “bodily injury” or “property damage” occurs during the policy period; \* \* \*

**SECTION V – DEFINITIONS**

\* \* \*

- 13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All “bodily injury” or “property damage” arising out of an “occurrence” or series of related “occurrences” is deemed to take place at the time of the first such damage or injury even though the nature and extent of such damage or injury may change; and even though the damage may be

continuous, progressive, cumulative, changing or evolving; and even though the “occurrence” causing such “bodily injury” or “property damage” may be continuous or repeated exposure to substantially the same general harmful conditions.

\* \* \*

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss or use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; and
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

17.

The liability insurance coverage provided by the Starr policy is modified by

Endorsement SSCG 0004 0210:

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

This insurance does not apply to any damages because of or related to bodily injury or property damage:

1. Which first existed, or alleged to have first existed, prior to the inception date of this policy;
2. Which are, or are alleged to be, in the process of taking place prior to the inception date of this policy, even if the actual or alleged bodily injury or property damage continues during this policy period.
3. Which were caused, or are alleged to have been caused, by the same condition or construction defect which resulted in bodily injury or property damage which first existed prior to the inception date of the policy.

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We shall have no duty to defend any insured against any loss, claim, suit or other proceeding alleging damages arising out of or related to bodily injury or property damage to which this endorsement applies.

18.

The claims asserted against Timberland in the Underlying Action are based on construction defects and property damage for which no coverage exists. In accordance with the terms of the Starr policy, Timberland is not entitled to indemnification or any defense against any of the claims alleged by Laurel Parc or Seabold in the Underlying Action. Starr is entitled to a judicial determination and declaration that it has no duty to indemnify or further defend Timberland against any liability or damages claimed in the Underlying Action. Starr is further entitled to reimbursement of any and all costs and expenses spent in Timberland's defense through the time of judgment in this action, including fees, costs and expenses that will be incurred while this action is pending.

#### **DEMAND FOR JURY TRIAL**

19.

Starr requests a trial by jury as to all claims for which a right to a jury exists.

\* \* \* \* \*

WHEREFORE, Starr requests entry of judgment in its favor as follows:

1. A declaration that Starr has no duty to indemnify or further defend Timberland in the Underlying Action, or to pay any resulting judgment entered against Timberland for damages or losses alleged in the Underlying Action or any settlement paid by Timberland or on its behalf;



2. A declaration that Starr is entitled to reimbursement from Timberland of any and all costs and expenses spent by Starr in Timberland's defense, including fees, costs and expenses that will be incurred while this action is pending;

3. An award of costs and disbursements incurred by Starr herein; and

4. An award for any further necessary or proper relief under 28 U.S.C. § 2202.

DATED this 24<sup>th</sup> day of January, 2013.

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By /s/ **David J. Ryan**

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